Supreme Court, U.S.
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No. 09-09-919

In The

Supreme Court of the United States

NIKOLA DEDAJ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the redacted confession of a non-testifying codefendant must be viewed in total isolation from all other evidence in the case or, rather, must be viewed in light of the prosecution's whole case in order to evaluate, under *Bruton v. United States*, 391 U.S. 123 (1968), the statement's likely impact on the jury in determining the guilt of the defendant.

2. Whether the holding of the Second Circuit, that a confession must be viewed in total isolation, or the conflicting view of the Eleventh Circuit and other circuits, that a confession must be viewed in the context of the prosecution's whole case, is correct in light of this Court's decision in *Gray v. Maryland*, 523 U.S. 185 (1998).

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were the United States of America against Prenka Ivezaj, Nardino Colotti, Alex Rudaj, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming the judgment was reported at *United States v. Ivezaj*, 568 F.3d 88 (2d Cir. 2009), and is reprinted in the appendix at App. 1. The summary order of the court of appeals issued in conjunction with the opinion is unreported and is reprinted in the opinion at App. 27. The rulings of the district court appeared in the trial transcript and are reprinted in the appendix at App. 34 and App. 40. The order of the court of appeals denying rehearing is reprinted in the appendix at App. 42.

JURISDICTION

The order of the court of appeals denying rehearing was entered on August 31, 2009. By Order of October 14, 2009, Justice Ginsburg extended to December 30, 2009, the time within which Petitioner may file a petition for a writ of certiorari. By Order of December 16, 2009, Justice Ginsburg further extended to January 28, 2010, the time within which

Petitioner may file such petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI, provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

STATEMENT OF THE CASE

1. Petitioner was convicted after a jury trial in the United States District Court for the Southern District of New York of one count of substantive RICO in violation of 18 U.S.C. § 1962(c), one count of RICO conspiracy in violation of 18 U.S.C. § 1962(d), one count of VICAR assault in violation of 18 U.S.C. § 1959(a)(3), one count each of running an illegal gambling business and conspiring with others to run an illegal gambling business in violation of 18 U.S.C. § 1955, one count each of extortion conspiracy and conspiracy to use extortionate means to collect extensions of credit in violation of 18 U.S.C. §§ 1951 and 894, and one count of using and carrying a firearm in connection with a crime of violence in violation of 18 U.S.C. § 924(c). Petitioner was sentenced to 314 months imprisonment, which included a mandatory

seven-year consecutive sentence with respect to the violation of 18 U.S.C. § 924(c).

The charges, brought by an indictment originally filed October 6, 2004, and by superseding indictment filed September 15, 2005, alleged that Dedaj, together with co-defendants Alex Rudaj, Nardino Colotti, Prenka Ivezaj, Ljusa Nuculovic, and Angelo DiPietro, as well as others, operated a criminal enterprise engaged in illegal gambling, extortion, and loansharking (the "organization"). According to the indictment, members of the organization engaged in violence in connection with its illegal businesses, to protect their "territory" from other organized crime groups and to instill fear in their victims to ensure payment.

Specifically, it was alleged that the organization, using force or the threat of force, took over gambling locations in Queens, New York, from the Lucchese organized crime family in 2001. After Tommy Napoli, a member of the Gambino organized crime family, opened a gambling club called "Soccer Fever" in Queens against the express wishes of the organization, Dedaj and others – armed with handguns – entered the club en masse, broke up the game, and assaulted a gambler who owed money to the organization.

2. During an interview with an FBI Agent following his arrest, co-defendant Nuculovic discussed the incident at Soccer Fever. At trial, during which Nuculovic did not testify, the FBI agent testified as

follows, in pertinent part, regarding the interview with Nuculovic:

> Q: What did he tell you?
>
> A: Mr. Nuculovic stated that in response to the opening of Soccer Fever, that *he and other members of his organization went to Soccer Fever* on the first or second day it was open to shut it down. And one other reason, they went there also to beat up Tommy Napoli.
>
> * * *
>
> Q: Now do you recall if Mr. Nuculovic identified how many people were with him when he went to Soccer Fever?
>
> A: He mentioned several people.
>
> Q: Did he identify a number?
>
> A: No.
>
> Q: Now, did you ask Mr. Nuculovic if any of the people he was with brought firearms when they went to Soccer Fever?
>
> A: Yes, I did.
>
> Q: What was Mr. Nuculovic's response?
>
> A: His exact response to that question, his exact words were, *we all had guns*. (COA App. 164; emphasis added.)

3. Prior to such testimony, the defendants had objected that admission of the statement that "we all had guns" would violate both *Crawford v. Washington*,

541 U.S. 36 (2004), and *Bruton v. United States*, 391 U.S. 123 (1968). They noted in particular that the statement expressly related to the members of the "organization," which could only have referred to the defendants at trial. In rejecting this argument, the district court stated the following with respect to the law in the Second Circuit:

> Applying the principals enunciated in *Bruton*, the Second Circuit has long held that confessions can be admitted at a joint trial by substituting a codefendant's name with a neutral pronoun, so long as the statement standing alone does not otherwise connect codefendants to the crimes. (App. 37) (*citing United States v. Williams*, 936 F.2d 698, 700 (1991)).

Applying that rationale to the Nuculovic statement that "we all had guns," the court stated:

> The issue under the confrontation clause, and, therefore, under *Bruton*, is not implicated here. This statement is coming in solely against Mr. Nuculovic. There has to be substantial independent evidence in order for the jury to have any understanding whatsoever as to what the content of the word "we" might mean, and, therefore, it does not implicate the concerns articulated by *Bruton*. (App. 41)

Based on the Nuculovic statement, Dedaj and the other defendants were convicted of gun possession in violation of 18 U.S.C. § 924(c).

4. The court of appeals affirmed the judgment of conviction. Although in addressing the numerous issues on appeal the court of appeals issued a published opinion and an accompanying summary order, the court did not specifically address this issue of Nuculovic's statement that "we all had guns," which was extensively briefed. The court did, however, address generally the adequacy of the district court's limiting instructions with respect to a number of statements attributed to Nuculovic, concluding that "the district court found that the statements were sufficiently redacted so that no other defendant could be implicated by Nuculovic's admission[, and w]e believe that any prejudice stemming from the testimony was minimal and was adequately addressed by the district court's prophylactic measures." (App. 30-31) The summary order included a catchall statement that "[w]e have considered defendant's remaining contentions and find them to be without merit." (App. 33)

Petitioner sought rehearing and rehearing en banc in the court of appeals with respect to the "we all had guns" statement, specifically calling the court's attention to its own intervening decision in *United States v. Jass*, 569 F.3d 47 (2009), which concerned the identical issue and essentially applied the same reasoning as the district court had in the instant case, *i.e.*, that where substantial evidence independent of the statement itself is required to connect the co-defendant's statement to the defendant, the statement may be admitted without

violating *Bruton*. By Order of August 31, 2009, the court of appeals denied the petition for rehearing without further elaboration. (App. 42-43)

REASONS FOR GRANTING THE PETITION

The Court Should Resolve The Circuit Split Involving The Second Circuit's Overly Narrow Interpretation of *Gray v. Maryland* and *Richardson v. Marsh*, in Which A District Court May Not Consider Any Evidence Other Than The Text of The Statement Itself, And The Conflicting Interpretation of The Eleventh Circuit And Other Circuits, Which Held That The Statement Must Be Evaluated in Light of The Prosecution's Entire Case.

1. Despite *Bruton*'s status as a landmark decision regarding the Confrontation Clause of the Sixth Amendment, the subsequent decisions of this Court have left considerable room for conflicting interpretation, particularly with respect to the common scenario where a co-defendant's statement contains a neutral pronoun which, when viewed in the context of other evidence in the case, makes it clear to the jury that the statement incriminates the defendant. Indeed, the various circuits have reached radically different conclusions regarding the extent to which, under *Gray v. Maryland*, 523 U.S. 185 (1998), and *Richardson v. Marsh*, 481 U.S. 200 (1987), a court

must consider the totality of the evidence at trial to determine whether a non-testifying co-defendant's incriminating statement leads to "inferences that a jury ordinarily could make immediately" to determine that the statement "obviously refer[red] to" the defendant.

The Second Circuit has expressly held that *Bruton* prohibits the admission of a co-defendant's statement only when the statement obviously incriminates the defendant on its face, without *any* reference to other evidence in the case, *United States v. Jass*, 569 F.3d 47 (2d Cir. 2009). The Eleventh Circuit has reached the opposite conclusion, holding that a statement must be viewed in the context of the prosecution's whole case in determining whether the statement would cause a reasonable person to infer the defendant's guilt. *United States v. Schwartz*, 541 F.3d 1331 (11th Cir. 2008). Other circuits have reached varying conclusions within that broad spectrum. The Court should grant certiorari in order to resolve this split between the circuits and to provide guidance in resolving this important question left unanswered in *Bruton*, *Richardson*, and *Gray*.

2. In *Gray v. Maryland*, where the prosecution had redacted a co-defendant's confession by substituting for the defendant's name a blank space or the word "deleted," the Court held that the defendant's right to confront witnesses was violated, just as if the confession had not been redacted at all, as in *Bruton*. *Gray v. Maryland*, 523 U.S. at 192.

The *Gray* Court noted that in cases like *Richardson v. Marsh*, where "the confession is redacted to eliminate not only the defendant's name, but any reference to his or her *existence*," the Confrontation Clause is not violated. 523 U.S. at 190, 196 (emphasis added.) However, the *Gray* Court limited the broad pronouncements previously expressed in *Richardson* concerning statements that incriminate inferentially and those that incriminate "on their face." The Court in *Gray*, "conced[ing] that *Richardson* placed outside the scope of *Bruton*'s rule those statements that incriminate inferentially" and further "conced[ing] that the jury must use inference to connect the statement in this redacted confession with the defendant," stated that "inference pure and simple cannot make the critical difference" and "*Richardson* must depend in significant part upon the *kind* of, not the simple *fact* of, inference." *Gray*, 523 U.S. at 195-96.

The *Gray* Court contrasted the facts in the case before it with the facts of *Richardson*, in which the co-defendant's statements did not mention the presence of anyone other than himself, and became incriminating of the defendant "only when linked with evidence introduced later at trial" – namely, when the defendant testified and admitted her presence in a car where the co-defendant discussed murder on the way to the victim's house – as opposed to the inferences which would have been obvious to the jury on hearing the evidence in *Gray*.

3. Here, where Nuculovic's statement that "*we* all had guns," was introduced as the last evidence in the prosecution's lengthy case, after hundreds of transcript pages of substantive independent evidence had already been heard by the jury as to the structure and activities of the "organization," including the defendants' putative roles in the takeover of Soccer Fever and the Astoria gambling business in general, the circumstances demonstrate that it would have been obvious to the jury that the statement could only have referred to the defendants at trial. This is particularly true since the antecedent for the pronoun "We" was "other members of [Nuculovic's] organization," and thus the universe of persons encompassed by "We" was circumscribed. An additional statement by Nuculovic regarding the "three leaders" of the organization, blurted out by the testifying case agent, further narrowed the very circumscribed universe of individuals to whom the "we all had guns" statement applied.

However, the district court's application of the Second Circuit's interpretation of the *Bruton* rule, i.e., that *Bruton* is not violated when "[t]here has to be substantial independent evidence in order for the jury to have any understanding whatsoever as to what the content of the word 'we' might mean," (App. 33), reflected the overly narrow view that any statement requiring a connection to other trial evidence to identify the defendants cannot be a violation of *Bruton*.

4. Implicit in the court of appeals' summary disposition of Petitioner's claim based on *Gray* is the conclusion made explicit five days later in *United States v. Jass* that the redacted confession of a non-testifying co-defendant must always be viewed in total isolation from all other evidence at trial in order to evaluate, under *Bruton*, its likely impact on the jury in light of the claimed effectiveness of a limiting instruction. Notably, the Second Circuit pointed out in *Jass* that it had rejected, in *United States v. Sanin*, 252 F.3d 79 (2d Cir. 2001), the argument that *Gray v. Maryland* had generally overruled the narrow doctrines employed by the Second Circuit to address *Bruton* concerns in such decisions as *United States v. Williams*, 936 F.2d 698. The *Jass* court stated that "this panel is bound by prior decisions of the court unless and until the precedents established therein are reversed *en banc* or by the Supreme Court." 569 F.3d at 58. Petitioner's case provides just such an opportunity to do so, an opportunity the Court should seize.

Despite its adherence to its own precedent, even the Second Circuit in *Jass* stated that "[w]here redaction is employed to avoid *Bruton* concerns, however, we urge district courts, wherever possible, to eliminate completely from a confession *any mention of a nondeclarant defendant's existence* as in *Richardson v. Marsh*," 481 U.S. 200, 211 (1987), and that "[n]eutral pronoun substitution should be employed only when complete redaction would distort the confession, for example, by 'exclud[ing] substantially exculpatory

information, or chang[ing] the tenor of the utterance as a whole.'" *Jass*, 569 F.3d at 56 n.5 (emphasis added) (citation omitted).

5. That the Second Circuit's *Bruton* jurisprudence, as elaborated upon in *Jass*, is by no means free from doubt is evidenced by the fact that the Eleventh Circuit held rather much the opposite in *United States v. Schwartz*, 541 F.3d 1331. There, the court, in holding that statements of Schwartz's co-defendant had been admitted in violation of *Bruton* even though Schwartz's name had been redacted and the jury instructed to use it only against the co-defendant, stated that "[w]e think the proper *Bruton* standard is clear from a close reading of *Bruton*, *Richardson*, *Gray*, and our subsequent *Bruton* decisions: a defendant's confrontation right is violated when the court admits a co-defendant statement that, *in light of the Government's whole case*, compels a reasonable person to infer the defendant's guilt." *Id.* at 1351 (emphasis added). The court rejected the view that *Richardson v. Marsh* ruled out the use of any inference in determining a *Bruton* issue, and noted that the Court in *Gray v. Maryland* had emphasized that the relevant inquiry was the kind of inference that needed to be made to connect the statement to the defendant.

Applying that reasoning to the circumstances before it, the *Schwartz* court concluded that the out-of-court statement of a co-defendant "powerfully incriminated" the defendant, "[e]ven though [the declarant's] statement 'was not incriminating on its face, and

became so only when linked' with other evidence." *Id.* at 1349, *quoting Richardson v. Marsh*, 481 U.S. at 208.

6. The conflicting interpretations offered by the Second Circuit in *Jass* and by the Eleventh Circuit in *Schwartz* provide only the most stark examples of the conflicting approaches among the circuits to the question of what information may be considered in determining whether a statement "obviously" incriminated a defendant. The conflict is manifest in the decisions of other circuits as well.

In *United States v. Nash*, 482 F.3d 1209 (10th Cir. 2007), the court, while not engaging in the degree of analysis employed by the *Schwartz* court, nevertheless concluded that statements that did not incriminate the defendant on their face without resort to an additional inference violated *Bruton*. In a narcotics prosecution in which the trial court had admitted a co-defendant's statements that "his partner was driving," that when stopped by police, "he had told his partner, 'Let's get the hell out of here, man[, y]ou know what we got,'" and that he had "confirmed with his driver, the driver, that they were heavily strapped, meant that they were armed and dangerous," the court concluded that such statements violated *Bruton*. The Tenth Circuit reasoned that:

> It is obvious that a jury immediately would understand that the terms "partner" and "his driver" were meant to refer to Nash. *Although the Government contends that Flott's use of the term "partner" required an*

> *inferential deduction* to establish Nash as a partner in the cocaine trafficking scheme, rather than simply Kinchion's acquaintance, we disagree. *The context in which this statement was made and recounted to the jury*, i.e., Flott's testimony that Kinchion said to his "partner," "You know what we got," *admits of no other possible inference*. The same holds true for the direct references to the "driver" in statements made by Kinchion.

Id. at 1218 (emphasis added). Despite the fact that the statements did not, on their face, draw attention to the fact of the redactions, the court concluded that "[t]hese statements, in our view, reflect the kind of inference the Supreme Court has sought to prohibit in joint trial." *Id.* at 1219.

In contrast, in *United States v. Edwards*, 159 F.3d 1117 (8th Cir. 1998), the court engaged in an interpretation similar to that of the Second Circuit in *Jass*. Significantly, the court observed that "[n]either *Richardson* nor *Gray* discussed the admissibility of confessions in which codefendants' names are replaced with a pronoun or similarly neutral word." *Id.* at 1125. Ultimately, the court determined that, since such statements required a link to other trial evidence to connect them to the co-defendants:

> Unlike use of the word "deleted," which directs the jury's attention to an obvious redaction, referring to joint activity by use of the pronouns "we" and "they," or by use of indefinite words such as "someone," does not draw attention to the redaction and thus, in

> most situations, will not be incriminating unless linked to a codefendant by other trial evidence.

Id. at 1126; *see also United States v. Ramos-Cardenas*, 524 F.3d 600, 609 (9th Cir. 2008) ("this seems to be an instance where the statement does not offend the Confrontation Clause because it only becomes incriminating, if at all, 'when linked with evidence introduced later at trial'") (*citing Richardson*, 481 U.S. at 208).

Somewhere between the conflicting interpretations discussed above was the conclusion reached by the Sixth Circuit in *United States v. Macias*, 387 F.3d 509 (6th Cir. 2004). There, the court expressly concluded that "[w]e do not believe the facts of this case are governed by *Richardson*," and that "the description of subject two was sufficiently specific that it could only have referred to Macias," and thus "the statement was incriminating on its face." *Id.* at 519. However, the circumstances of the case indicate that the statement necessarily required a link to other evidence in the case – specifically, evidence of the defendant's home address – in order for a jury to have concluded that it obviously referred to the defendant. *Id.*

It is thus evident that nothing approaching a consensus exists among the courts of appeals as to this important question. This Court may agree with the sensible analysis in *Schwartz* rather than the constricted analysis exemplified by *Jass*, since the

latter risks defying common sense and rendering *Bruton* all but dead letter. Accordingly, the Court should grant certiorari to resolve the split between the circuits with respect to the questions left open in *Gray* and *Richardson*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, NY
January 27, 2010

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: May 13, 2008 Decided: June 11, 2009)

Docket Nos. 06-3112-cr (L), 06-3275-cr (CON), 06-3296-cr (CON), 06-3339-cr (CON), 06-3372-cr (CON), 06-5908-cr (CON).

UNITED STATES OF AMERICA,

Appellee,

-v.-

PRENKA IVEZAJ, NARDINO COLOTTI, ALEX RUDAJ, ANGELO DIPIETRO, NIKOLA DEDAJ, AND LJUSA NUCULOVIC,*

Defendants-Appellants.

Before: FEINBERG, MINER and B.D. PARKER, *Circuit Judges*.

Defendants appeal from judgments of conviction entered in the United States District Court for the Southern District of New York (Cote, *J.*) for racketeering, RICO conspiracy, conspiracy to conduct an

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* The Clerk of Court is directed to amend the official caption as indicated.

illegal gambling business, and using and carrying firearms during and in relation to a crime of violence. Affirmed.

RICHARD A. GREENBERG (Steven Y. Yurowitz, *on the brief*), New York, N.Y., *for Defendant-Appellant Prenka Ivezaj*.

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JENNIFER G. RODGERS, Assistant U.S. Attorney (Timothy J. Treanor, Benjamin Gruenstein & Jonathan S. Kolodner, Asst. U.S. Attorneys, *on the brief*), *for* Michael J. Garcia, United States Attorney for the Southern District of New York, New York, N.Y., *for Appellee*.

BARRINGTON D. PARKER, *Circuit Judge*:

Defendants-Appellants Prenka Ivezaj, Nardino Colotti, Alex Rudaj, Angelo DiPietro, Nikola Dedaj,

and Ljusa Nuculovic (collectively "appellants" or "defendants") appeal from judgments of conviction entered in the United States District Court for the Southern District of New York (Cote, *J.*) on charges arising from their involvement in a racketeering enterprise. We affirm the convictions for the reasons stated in this opinion and in a companion summary order.

BACKGROUND

The indictment charged, and the trial evidence, considered in the light most favorable to the government, established that the appellants were members of the Rudaj Organization (the "Organization"), a violent Albanian racketeering organization based in New York City and Westchester County. The government alleged that the Organization sought to challenge, through violence and intimidation, the primacy of the New York City area's traditional organized crime families. Gambling was a particularly active area of competition. After operating illegal gambling businesses in the Bronx and Westchester County, the Rudaj Organization forcibly took over several illegal gambling clubs in Astoria, Queens and required other bars and restaurants to install and use its gambling machines. In addition to gambling, the Organization engaged in a variety of other illegal conduct, including extortion, loansharking, and bank fraud.

These activities generated an indictment initially containing twenty-one counts, fifteen of which were ultimately presented to the jury. We address here only those relevant to our opinion. Count One charged all of the appellants with substantive racketeering, and Count Two charged them with racketeering conspiracy. *See* 18 U.S.C. § 1962(c), (d). To establish the pattern of racketeering activity charged in Count One, the government alleged that the defendants engaged in a series of predicate acts, many of which were also charged as separate counts. Of these, Racketeering Acts Four and Five are at the center of our analysis. Racketeering Act Four alleged that Rudaj, Dedaj, Ivezaj, Nuculovic, and DiPietro attempted to extort, conspired to extort, and extorted control of an illegal gambling operation from Fotios Dimopoulos and Antonios Balampanis. Racketeering Act Five charged Rudaj, Colotti, Dedaj, Ivezaj, Nucolovic, and DiPietro with extorting and conspiring to extort the owners of a gambling business, known as "Soccer Fever," in violation of New York's extortion laws. *See* N.Y. Penal Law §§ 105.13, 155.05, 155.40. All defendants were also charged in Count Thirteen with using and carrying firearms in aid of racketeering. *See* 18 U.S.C. §§ 924(c)(1)(A)(ii) & 2.

The government's evidence included the testimony of investigating officers, various cooperating witnesses and victims, consensual tape recordings, recorded conversations from Title III interceptions, as well as physical evidence seized during various searches. At the conclusion of the trial, the district court dismissed

several of the counts. The defendants were then convicted on all but one of the remaining counts (but not all of the predicate racketeering acts) and were sentenced to substantial prison terms.

The defendants appeal on various grounds. We decide here that control over illegal intangible property – here a gambling operation – is "property" that can be "delivered" under New York's extortion statute. We also conclude that Balampanis was a proper "victim" of an inchoate extortion offense under New York law; that Count One qualified as a "crime of violence" under 18 U.S.C. § 924(c); and that the district court did not err in applying a role enhancement to Ivezaj's sentence. Additionally, we decide that the admission of evidence seized from Rudaj's home, if error at all, was harmless. Accordingly, we affirm the judgments.

DISCUSSION

I. Whether Illegal Intangible Goods Qualify as "Property" under New York Extortion Law

Defendants[1] challenge their convictions on Racketeering Acts Four and Five, which alleged violations

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[1] Several of the defendants simply join in the arguments of their co-defendants where there is no inconsistency between those arguments and the arguments made in their own briefs. We use the general term "defendants" to avoid confusion.

of New York's extortion laws.[2] Their main contention is that the alleged acts are legally insufficient to sustain a conviction because control over illegal gambling does not constitute "property" under New York's extortion law and, even if it did, no property was "delivered" as is required by the statute. We review *de novo* the grant or denial of a Rule 29 motion for judgment of acquittal. *United States v. Eppolito,* 543 F.3d 25, 45 (2d Cir. 2008); *United States v. Florez,* 447 F.3d 145, 154 (2d Cir. 2006).

As proof of Racketeering Act Four, the government established that the Organization, through violence and intimidation, wrested control of certain illegal gambling operations in Astoria from the Lucchese Crime Family. In June of 2001, members of the Rudaj Organization seriously assaulted Antonios Balampanis, a close companion of Fotios Dimopoulos, a Lucchese family associate who supervised their Astoria operations. Dimopoulos later told Balampanis that his beating had been intended as "a message" for Dimopoulos, and Dimopoulos never returned to gambling clubs in Astoria following the assault.

Racketeering Act Five related to the Rudaj Organization's operation of "barbut," a lucrative gambling activity in Astoria. In early August 2001, a

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[2] State law crimes such as extortion can constitute racketeering acts under RICO. 18 U.S.C. § 1961(1)(A) includes "any act or threat involving . . . extortion, . . . which is chargeable under State law and punishable by imprisonment for more than one year" in its definition of "racketeering activity."

Gambino associate, Tommy Napoli, opened a gambling club known as "Soccer Fever" that directly competed with barbut and was operated by Mikhail Hirakis. On the club's first night, Soccer Fever brought in approximately $8,000. The next night, approximately fifteen members of the Organization, including the six defendants, stormed the club with guns on the instruction of Rudaj and broke up the game. They intended to assault Napoli, but when they were unable to locate him, they assaulted Hirakis instead. Rudaj intimidated the club's patrons: "I don't want to see nobody here. If I see [you] one more time, I swear to God . . . I beat you . . . one by one. I eat you up. . . . It's closed." That was the end of Soccer Fever, and the Organization subsequently extended its control of illegal gambling in Astoria.

Under New York law, "[a] person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will . . . [c]ause physical injury to some person in the future. . . ." N.Y. Penal Law § 155.05(2)(e)(1). "Property" is defined as "any . . . personal property . . . or any article, substance or thing of value . . . which is provided for a charge or compensation." N.Y. Penal Law § 155.00(1).

The district court instructed the jury that "[t]he term property includes not only money and other physical or tangible things, but also any valuable right considered as a source or element of wealth."

Moreover, "[t]he pursuit of a business, including the solicitation of customers necessary to the conduct of the business, is considered property, as are the proceeds of a business." Further, the court charged that "[i]t does not matter . . . if the victim's initial acquisition or possession of tangible property was illegal, or if the business in which the victim is engaged is illegal. Illegally obtained assets and businesses conducted in violation of the law can constitute property."

While acknowledging that an intangible good may constitute property under New York law, defendants challenge this instruction on the ground that "control over illegal gambling" does not constitute property because a legal right to the alleged property is required before it can qualify as property under New York law. They contend that because the Luccheses and the various victims had no legal right to operate an illegal gambling business, Racketeering Acts Four and Five did not sufficiently allege extortion.

We agree with the district court that an illegal gambling business can constitute property under New York law. The statute broadly defines "property" as "any . . . personal property, real property . . . substance or thing of value . . . which is provided for a charge or compensation." N.Y. Penal Law § 155.00(1). Illegal intangible property, such as that contemplated here, fits within this expansive definition: control over illegal gambling is a "thing of value" which is "provided for . . . compensation."

This understanding is consistent with the New York courts' recognition that intangible property as well as illegal tangible property are covered by the statute. For example, in *People v. Garland,* 69 N.Y.2d 144, 147 (1987), the New York Court of Appeals held that intangible goods – in that case, a tenant's right to occupy an apartment – could constitute "property," noting that "an interest need not be transferable to constitute 'property' [under N.Y. Penal Law § 155.00(1)]." *See also People v. Spatarella,* 34 N.Y.2d 157, 162 (1974) ("property" includes intangible goods, because "[s]urely the extortionist's demand for the business itself, or a part of it, is, if anything, more egregious than the demand simply for money"); *People v. Dixson,* 798 N.Y.S.2d 659, 664 (Crim. Ct. 2005). Under New York law, illegal tangible goods can also constitute "property." *See People v. Hardwick,* 524 N.Y.S.2d 798, 800 (App. Div. 1988) ("That it was unlawful for [the victims] to possess the narcotics is no defense to the defendant's unlawful taking of them."); *People v. Izzo,* 96 Misc.2d 634 (Crim. Ct 1978) ("Ownership . . . is a broad concept. Even a person who has himself stolen property has a right of possession superior to that of a third person who wrongfully takes it from him. . . ."); *see generally People ex rel. Short v. Warden of City Prison,* 130 N.Y.S. 698, 700 (App. Div. 1911) ("'[P]roperty'" is "intended to embrace every species of valuable right and interest, and whatever tends in any degree, no matter how small, to deprive one of that right, or interest, deprives him of his property."). Given such an expansive definition of "property," and the absence

of any legality requirement in the statute, we see no indication that the New York legislature intended that illegal intangible assets could not be the subject of extortion.

Our jurisprudence interpreting the Hobbs Act also supports our analysis here. The Hobbs Act was modeled on the New York extortion statute, and New York courts have often looked to Hobbs Act jurisprudence for guidance. *See, e.g., People v. Capparelli,* 603 N.Y.S.2d 99, 104 n.1 (Sup. Ct. 1993) (citing cases for the proposition that "New York appellate courts frequently refer to federal cases interpreting the Hobbs Act"); *see also Scheidler v. Nat'l Org. for Women, Inc.,* 537 U.S. 393, 403 (2003) ("Congress used two sources of law as models in formulating the Hobbs Act: the Penal Code of New York and the Field Code, a 19th-century model penal code."). In *United States v. Gotti,* 459 F.3d 296 (2d Cir. 2006), we reviewed our Hobbs Act precedents following the Supreme Court's decision in *Scheidler,* and we reaffirmed that "intangible property rights can qualify as extortable property under the Hobbs Act. . . ." 459 F.4d at 323. Moreover, we held that such rights "can qualify as extortable property under the Hobbs Act regardless of whether its exercise, transfer, or sale would be legal." *Id.* at 325. Importantly, we did not "see any basis for imposing a 'legality' requirement on the extortion of both tangible and intangible property." *Id.* at 326.

Defendants argue that even if control over an illegal gambling business could be extorted under

New York law, defendants did not "obtain" this property because it was never "delivered" to them. *See* N.Y. Penal Law § 155.05(2)(e). We find this interpretation imaginative but overly literal and, in any event, not supported by the law. Under New York law, an intangible property right – which by definition cannot be "delivered" in the traditional sense – can be extorted. *See Garland,* 69 N.Y.2d at 146-479; *Spatarella,* 34 N.Y.2d at 162 ("property" under the extortion statute includes intangible rights). For similar reasons, we reject defendants' argument that they could not have transferred or delivered control over a criminal business "in any sense that the law protects." Again, it is established under New York law that illegal goods, such as drugs or drug proceeds, which are not capable of lawful transfer, fall under the extortion statute. *See Hardwick,* 524 N.Y.S.2d at 800.

II. Whether Balampanis is a Victim of Inchoate Extortion Offenses Under New York Law

The defendants also argue that "[w]hatever the reason for Balampanis's beating, he could not be the actual or intended 'victim' of an inchoate extortion offense." New York law requires that the victim of a substantive extortion offense be an "owner" of the extorted property. Defendants focus on the use of the word "owner" in the statute, which provides that "[w]hen property is taken, obtained or withheld by one person from another person, an 'owner' thereof means any person who has a right to possession

thereof superior to that of the taker, obtainer or withholder." N.Y. Penal Law § 155.00(5). They contend that the government's proof and the court's charge were insufficient because the "victim" of extortionate conduct must own or control the property extorted, and Balampanis did neither.

The district court rejected the defendants' arguments. On this count, in response to a jury request on this issue,[3] the court instructed the jury as follows:

> THE COURT: Racketeering Act Four charges three crimes. To find that the crime of extortion was committed, you must find that at least Foti Dimopoulos was a victim of the extortion.
>
> With respect to the crimes of attempted extortion and conspiracy to commit extortion, you must find that at least one of the two identified victims in Racketeering Act Four, Foti Dimopoulos and Tony Balampanis, was an intended victim of those crimes.
>
> You may also consider or lump together the evidence regarding both identified victims to decide whether the government has proven any one of these three charges; extortion, attempted extortion or conspiracy to commit extortion. Remember in this context that it is a crime to use force or violence against one

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[3] The jury sent a note during deliberations asking whether "the victims, Foti Dimopoulos and Tony Balampanis, [should be] looked at individually or lumped together as victims[.]"

> person to obtain property from another with that second person's consent by instilling fear in that second person, as I have explained in my charge.

Given the tripartite nature of Racketeering Act Four – which alleged that several of the defendants engaged in extortion conspiracy, substantive extortion, and attempted extortion and that "any one of which . . . constitutes the commission of Racketeering Act Four" – we find no error in the court's instructions. The district judge properly charged that Balampanis could be a victim for the attempt and conspiracy offenses. The fact that Balampanis was not actually the owner does not matter for these offenses; rather, the key inquiry for the jury in an attempted extortion charge is whether the defendants *thought* he was. *See People v. Davis,* 72 N.Y.2d 32, 36 (1988) ("[F]actual impossibility will not provide a defense to a prosecution for attempted intentional acts. . . ."); *People v. Gardner,* 144 N.Y. 119, 124-26 (1894) (factual impossibility is no defense to attempt because attempt "depends upon the mind and intent of the wrongdoer, not on the effect or result upon the person sought to be coerced"); N.Y. Penal Law § 110.10 ("If the conduct in which a person engages otherwise constitutes an attempt to commit a crime . . . , it is no defense . . . that the crime charged to have been attempted was . . . factually or legally impossible of commission. . . ."). The same is true for conspiracy; only the defendants' state of mind is relevant. *See People v. Russell,* 555 N.Y.S.2d 67, 68

(App. Div. 1990) (impossibility is not a defense to conspiracy).

Because there was ample evidence that the defendants believed Balampanis, a close associate of Dimopoulos, helped control illegal gambling in Queens – no matter whether he did or not – we conclude that the district court did not err in denying the defendants' Rule 29 motion and charging the jury that Balampanis could be a victim of the attempt and conspiracy charges.

III. Defendants' 18 U.S.C. § 924(c) Convictions

Next, defendants challenge their firearms convictions. Under 18 U.S.C. § 924(c)(1)(A), "any person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm" is guilty of a federal crime. Count Thirteen charged the defendants with violating this provision, specifically naming Count One, the substantive racketeering charge, as the predicate crime of violence.

Defendants raise two challenges to their § 924(c) conviction. First, they challenge the district court's ruling that Count One qualifies as a "crime of violence." The district court held that the convictions fell within § 924(c), because Count One specifically charged violent predicate racketeering acts, even

though a conviction under § 1962 is not necessarily a conviction for a crime of violence.

A crime of violence is an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(A), (c)(3)(B). When determining whether an offense is a "crime of violence" under the statute, we employ a "categorical approach," in which "we focus on the intrinsic nature of the offense rather than on the circumstances of a particular crime." *United States v. Acosta,* 470 F.3d 132, 135 (2d Cir. 2006). In *Acosta,* we concluded that a conspiracy to "injure, oppress, threaten, or intimidate any person" in connection with exercising their constitutional rights under 18 U.S.C. § 241 was a crime of violence. We reasoned that "[s]ince applying physical force is perhaps the most obvious way to injure, threaten, or intimidate, a conspiracy to engage in such conduct is, by its nature, a conspiracy that involves a 'substantial risk that physical force' will be used." *Id.* at 136.

Applying this categorical approach, we first look to "the intrinsic nature" of the statute. Section 1962(c), the statutory basis for the substantive racketeering offense in Count One, provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." A pattern of racketeering activity is defined as "at least two acts of racketeering activity. . . ." 18 U.S.C. § 1961(5). *See United States v. Gotti*, 451 F.3d 133, 136-37 (2d Cir. 2006) (elaborating on how a "pattern of racketeering" may be proven).

Because racketeering offenses hinge on the predicate offenses comprising the pattern of racketeering activity, we look to the predicate offenses to determine whether a crime of violence is charged. Applying this reasoning, we hold that where the government proves (1) the commission of at least two acts of racketeering and (2) at least two of those acts qualify as "crime[s] of violence" under § 924(c), a § 1962 conviction serves as a predicate for a conviction under § 924(c).[4] We thus find no error in the district court's conclusion that the charged RICO offense was a crime of violence. The underlying

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[4] This conclusion aligns neatly with our caselaw that a RICO conspiracy can constitute a "crime of violence" under statutes that provide virtually identical definitions of that term to the definition provided in § 924(c). *See, e.g., United States v. Ciccone*, 312 F.3d 535, 541-42 (2d Cir. 2002) (holding that the charged RICO conspiracy was a crime of violence under the Bail Reform Act); *United States v. Doe*, 49 F.3d 859, 866-67 (2d Cir. 1995) (finding no error in district court's ruling that a RICO conspiracy was a crime of violence under the Juvenile Delinquency Act).

predicate acts, with one exception,[5] allegedly involved the use of violent means, including loansharking and violent acts of extortion; unquestionably, the conduct charged in Count One posed a "substantial risk that physical force against the person or property of another" would be used in its commission. *See* 18 U.S.C. § 924(c)(3)(A), (c)(3)(B).

The defendants' second contention is that, because the violent predicates were state law offenses, their crime of violence was not one "prosecut[able] in a court of the United States" as required by § 924(c). We conclude that whether the alleged firearms conduct was premised on state or federal predicates is irrelevant, provided that the government proves, as it did here, that the § 1962 offense alleging the pattern of racketeering is a crime of violence. The jury only considered the state law predicates to determine that the defendant used firearms as charged in Count One, which, as previously discussed, is undeniably a crime "prosecut[able] in a court of the United States" and a "crime of violence" for the purposes of § 924(c).

IV. Whether Evidence from Rudaj's Home Should Have Been Suppressed

We next consider whether the district court erred in admitting evidence taken from a search of Rudaj's bedroom and walk-in closet. On an appeal from a

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[5] The only predicate act that was not a crime of violence was one charging gambling offenses.

district court's ruling on a motion to suppress evidence, we review the court's factual findings for clear error, viewing the evidence in the light most favorable to the government. The district court's legal conclusions are reviewed *de novo*. *See United States v. Rodriguez*, 356 F.3d 254, 257 (2d Cir. 2004).

At approximately 6:30 in the morning on October 26, 2004, federal law enforcement agents knocked on Rudaj's door to execute an arrest warrant. The agents did not have a search warrant for Rudaj's home. Rudaj answered the door unarmed and in his boxer shorts; the government accompanied him inside, purportedly to get him dressed. Rudaj told the agents that he had a loaded hunting rifle next to his bed, which they would see when they entered his bedroom. He also said that no other individuals other than his wife and children were in the home.

After handcuffing Rudaj, the agents then secured the rest of his family members on the first floor and executed what they termed a "protective sweep," which included, as one agent testified, "the bedroom in part because we have to be in the residence in order to get him dressed." Agent Gregory Massa testified that he and his partner went upstairs to the master bedroom, and after observing the rifles propped against the bed, cleared the bedroom to ensure the safety of themselves and the other agents and to confirm that no one else was there.

They first entered the walk-in closet in the master bedroom because it "posed the greater threat."

They saw the barrel of a rifle above a pile of clothing and proceeded to clear that corner of the closet. Agent Massa testified that while doing so, they "noticed another weapon that was shorter, another rifle that was shorter in length, and several clear plastic bags which you could clearly see that contained gun cleaning equipment, things of that nature, all right in the same area." They also saw a green handgun case and two knives. The agents then cleared the second smaller closet and saw another bag, similar to those seized from the walk-in closet, and a box that contained handgun holsters, a taser, and handcuffs.

The district court denied in part and granted in part Rudaj's motion to suppress the evidence taken from his home. The court first concluded that the search of his closets could not be characterized as a protective sweep incident to his arrest. Applying *Maryland v. Buie,* 494 U.S. 325 (1990), the district court found that the sweep did not involve a search "adjoining the place of arrest" nor did the agents have articulable facts regarding the presence of others posing a danger to them to justify a more far-reaching search.

Nevertheless, the court ruled that the evidence from the search of the bedroom – the two guns on either side of the night stand and the money and keys found on the dresser – was admissible. Looking to our holding in *United States v. Di Stefano,* 555 F.2d 1094, 1101 (2d Cir. 1977), in which we held that officers have a duty to find clothing when the defendant is arrested in a state of undress, the court concluded

that the agents properly secured Rudaj and, in looking for his clothing in the bedroom, could seize the contraband in his bedroom that was in plain view.

The district court further ruled that the evidence from the walk-in closet was admissible as a security sweep incident to the search for Rudaj's clothing. The district court reasoned that "[t]here is every reason to find that the balance struck in *Buie* should extend to protective searches that are conducted incident to the entry into a residence for the purpose of securing clothes for an insufficiently dressed arrestee." Therefore, because the area in the walk-in closet could potentially harbor a dangerous individual, the agents appropriately opened the closet door and observed the barrel of a handgun lying on a shelf in plain view and were therefore entitled to search the back of the closet and seize the weapon. While there, the court reasoned, they could also seize other incriminating evidence in plain view. However, the district court concluded that the evidence from the second, smaller closet was inadmissible because the objects removed from that closet – a white plastic bag and a plain cardboard box – were not "patently incriminating" because, unlike the white plastic bags properly removed from the master closet, the "the bag in the smaller closet did not reveal any incriminating contents through the transparent plastic." Thus, the agents were not justified in removing that bag from the closet to assess its contents.

We agree that the agents were permitted to enter Rudaj's bedroom to find clothing for him and seize

any incriminating evidence that was in plain view. However, Rudaj also argues that the district court wrongfully expanded the scope of the "protective sweep" doctrine by admitting the evidence seized from the closets. In *United States v. Miller*, 430 F.3d 93 (2d Cir. 2005), decided after the district court's denial of Rudaj's suppression motion, we specifically held that the "protective sweep" doctrine delineated in *Buie* applies in "circumstances other than during the in-home execution of an arrest warrant." *Miller*, 430 F.3d at 100. Similarly, we stated that protective sweeps would be justified only if the police possessed "specific, articulable facts giving rise to a reasonable inference of danger." *Id.* Rudaj argues that because the officers had no articulable reason to believe that the closets posed any danger, the district court should have suppressed all of the evidence from the closets.

We need not even resolve the question of whether *Miller* extends to the search of the closets at issue here, because we conclude that the admission of the evidence against Rudaj, if error at all, was harmless. A district court's erroneous admission of evidence is harmless "if the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury." *United States v. Garcia*, 291 F.3d 127, 143 (2d Cir. 2002) (quoting *United States v. Rea*, 958 F.2d 1206, 1220 (2d Cir. 1992)). In conducting harmless error review, we consider the following factors: "(1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of

the wrongly admitted [evidence]; and (4) whether such evidence was cumulative of other properly admitted evidence." *United States v. Kaplan*, 490 F.3d 110, 123 (2d Cir. 2007) (quoting *Zappulla v. New York*, 391 F.3d 462, 468 (2d Cir. 2004) (internal quotation marks omitted)); *see also United States v. Garcia*, 413 F.3d 201, 217 (2d Cir. 2005).

Although the government discussed the evidence at summation, we conclude that the admission of the evidence was harmless error. First, the government's evidence as to the issue of Rudaj's involvement in violent conduct was extensive. Several of Rudaj's recorded conversations in which he described engaging in violent extortionate conduct involving guns were heard by the jury. Additionally, multiple witnesses testified about the violent crimes that Rudaj committed in furtherance of the Organization. Thus, the evidence consisting of the rifles and ammunition seized at the scene was cumulative of the testimonial evidence regarding Rudaj's participation in violent racketeering acts. Further, it is unlikely that Rudaj was prejudiced by the government's statements. The district court instructed the jury that it could only convict Rudaj of the § 924(c) charge if it found that he had used or carried a firearm in connection with either the extortion of Dimopoulos and Balampanis or that of the Soccer Fever victims. In light of these instructions, the seized evidence from his house had little impact on Rudaj's § 924(c) conviction. Because the government adduced ample evidence to establish Rudaj's commission of the

substantive RICO offense apart from the admission of the guns, we see no reason to disturb his conviction.

V. Ivezaj's Role Enhancement

Finally, Ivezaj challenges his sentence on the ground that any aggravating role enhancement the district court applied should have been based on the conduct alleged in the underlying predicate acts, rather than on his role in the RICO enterprise as a whole. We typically review a district court's factual findings in support of a role enhancement for clear error. *See United States v. Huerta,* 371 F.3d 88, 91 (2d Cir. 2004). However, because Ivezaj's challenge requires us to make a legal determination about the applicability of the enhancement, we review the district court's determination *de novo. See United States v. Chacko,* 169 F.3d 140, 150 (2d Cir. 1999).

U.S.S.G. § 2E1.1 addresses the base offense levels for RICO offenses, requiring a base offense level of 19 or the offense level applicable to the underlying racketeering activity. Application Note 1 to the Guideline provides that:

> Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.

U.S.S.G. § 2E1.1, cmt. n.1. Because the Application Note treats each predicate act as "if [it were] contained in a separate count of conviction" for purposes of determining the offense level for the alleged racketeering activity, Ivezaj argues that the district court failed to consider his role in each charged act when applying the role enhancement.

We agree with the district court that a defendant's role adjustment is to be made on the basis of the defendant's role in the overall RICO enterprise. In *United States v. Damico,* the Seventh Circuit concluded that:

> [The Application Note] only requires the underlying offenses to be treated separately "for the purposes of subsection (a)(2)" – that is, only for the purpose of establishing the base offense level applicable to the RICO conspiracy. The note does not say that the separate treatment extends as well to application of the Chapter Three adjustments.

99 F.3d 1431, 1437 (7th Cir. 1996); *accord United States v. Yeager,* 210 F.3d 1315, 1316 (11th Cir. 2000).

We find *Damico* persuasive. First, as the government contends, analyzing a defendant's role in the overall RICO enterprise makes a good deal more sense than considering his role in each underlying predicate. In the case of a § 3B1.1(b) role enhancement, it makes little sense to allow a defendant who acts in a leadership capacity in a wide-ranging criminal enterprise to have his offense level adjusted

on the basis of his participation in discrete racketeering acts. For example, a defendant who served as a leader or manager of an extensive RICO enterprise should not be able to avoid a role enhancement simply because certain predicate acts involved fewer than five participants or criminal activity that was not extensive. Second, we agree that the language of the Guidelines is clear that the requirement to look at each individual act in a RICO offense is only for the purpose of establishing the base level offense, not for applying the Chapter Three adjustments.

Therefore, we agree with the Seventh Circuit that there is "nothing in section 2E1.1 or its commentary to indicate that an adjustment like that in section 3B1.1 should not be applied to a RICO base offense level . . . in the same way that it would to any other base offense level," that is, "by looking to the count of conviction . . . and all relevant conduct. . . ." *Damico,* 99 F.3d at 1437. Because there was sufficient evidence to show that Ivezaj qualified for the enhancement for his role in the overall RICO enterprise, we affirm his sentence.

CONCLUSION

For the foregoing reasons, the judgments of conviction are AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: (SUMMARY ORDER). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the city of New York, on the 11th day of June, two thousand nine,

PRESENT:

HON. WILFRED FEINBERG,
HON. ROGER J. MINER,
HON. BARRINGTON D. PARKER,
Circuit Judges.

United States of America,

Appellee,

-v.-

Prenka Ivezaj, Nardino Colotti, Alex Rudaj, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic,*

Defendants-Appellants.

Nos. 06-3112-cr (L), 06-3275-cr (CON), 06-3296-cr (CON), 06-3339-cr (CON), 06-3372-cr (CON), 06-5908-cr (CON)

SUMMARY ORDER

FOR DEFENDANT-APPELLANT IVEZAJ:	RICHARD A. GREENBERG (Steven Y. Yurowitz, *on the brief*), New York, N.Y.
FOR DEFENDANT-APPELLANT COLOTTI:	RICHARD WARE LEVITT (Yvonne Shivers, *on the brief*), New York, N.Y.
FOR DEFENDANT-APPELLANT RUDAJ:	HAROLD PRICE FAHRINGER (Erica T. Dubno, *on the brief*), New York, N.Y.
FOR DEFENDANT-APPELLANT DIPIETRO:	JONATHAN SVETKEY, New York, N.Y.

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* The Clerk of Court is directed to amend the official caption as indicated.

FOR DEFENDANT-APPELLANT DEDAJ:	DIARMUID WHITE (Brendan White, *on the brief*), New York, N.Y.
FOR DEFENDANT-APPELLANT NUCULOVIC:	JOHN BURKE, Brooklyn, N.Y.
FOR APPELLEE:	JENNIFER G. RODGERS, Assistant United States Attorney (Timothy J. Treanor, Benjamin Gruenstein and Jonathan S. Kolodner, Asst. United States Attorneys, *on the brief*), *for* Michael J. Garcia, United States Attorney for the Southern District of New York, New York, N.Y.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgments of conviction are AFFIRMED.

Defendants-Appellants Prenka Ivezaj, Nardino Colotti, Alex Rudaj, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic (the "defendants") appeal their judgments of conviction entered by the United States District Court for the Southern District of New York (Cote, *J.*) on racketeering and other charges. We assume the parties' familiarity with the underlying facts, procedural history, and issues presented on appeal, as well as the opinion in this case filed separately today.

Defendants challenge the district court's refusal to discharge Juror Four. Several defense counsel moved to dismiss the juror, complaining that the juror engaged in outbursts and other behavior suggesting antagonism towards the defendants. Rather than dismiss the juror, the district court gave general instructions to the jury reminding them to keep open minds and refrain from discussing the case or sharing opinions aloud before the termination of trial. "The determination of whether a juror can serve impartially will not be disturbed absent a clear abuse of discretion." *United States v. Perez,* 387 F.3d 201, 205 (2d Cir. 2004). Because we give trial judges broad flexibility in handling such matters, we find no abuse of discretion here.

Defendant Colotti contends that the district court erred in excusing Juror 90. Both the judge and the courtroom deputy spoke with the juror on different occasions regarding personal matters that were interfering with her ability to serve. Eventually, the juror was dismissed. We find no abuse of discretion in the manner in which the district court handled the dismissal.

Several defendants also claim that the district court erred in admitting non-testifying codefendant Nuculovic's inculpatory statements to federal agents. Before he was arrested, Nuculovic admitted that he had been involved in a criminal organization run by Colotti, Rudaj, and Dedaj. When the government informed the district court of its intention to offer his statements, the defendants moved for severance on

the grounds that the admission of the testimony would violate the Sixth Amendment's Confrontation Clause. The court instead ordered a number of redactions. The orders precluded any government witness from testifying about Nuculovic's use of the phrase "three leaders" to describe the leadership of the Rudaj Organization as such testimony would implicate Colotti, Rudaj, and Dedaj. After one of the agents testified that Nuculovic had stated that he and "three leaders" of the organization took over illegal gambling, the court recessed and reminded the parties that it had prohibited the government from referring to the "three leaders." At that point, counsel for Rudaj, Colotti, and Dedaj moved for a mistrial, which the district court denied. In response to defense counsel's desire not to call additional attention to the agent's mistake, the district court struck the statements from the record outside the presence of the jury.

We review a district court's evidentiary decisions for abuse of discretion, *see United States v. Thompson*, 528 F.3d 110, 120 (2d Cir. 2008), and find none here. The district court specifically instructed the jury prior to the agent's testimony that Nuculovic's inculpatory statements were being admitted solely against Nuculovic and that the jury was not to consider the statements against any other defendant. "Absent evidence to the contrary, we must presume that juries understand and abide by a district court's limiting instructions." *United States v. Downing*, 297 F.3d 52, 59 (2d Cir. 2002). Additionally, the district court

found that the statements were sufficiently redacted so that no other defendant could be implicated by Nuculovic's admission. We believe that any prejudice stemming from the testimony was minimal and was adequately addressed by the district court's prophylactic measures. Accordingly, the defendants' challenges fail.

Rudaj and Colotti next challenge the district court's failure to dismiss one of the racketeering acts. Because the jury ultimately found that charge unproven, the defendants claim that we should conclude retroactively that the racketeering act was improperly joined because it had a prejudicial spill-over effect. "The term 'retroactive misjoinder' refers to circumstances in which the 'joinder of multiple counts was proper initially, but later developments – such as a district court's dismissal of some counts for lack of evidence or an appellate court's reversal of less than all convictions – render the initial joinder improper.' " *United States v. Hamilton*, 334 F.3d 170, 181 (2d Cir. 2003) (quoting *United States v. Jones*, 16 F.3d 487, 493 (2d Cir. 1994)). "The concept of prejudicial spillover . . . requires an assessment of the likelihood that the jury, in considering one particular count or defendant, was affected by evidence that was relevant only to a different count or defendant." *Hamilton*, 334 F.3d at 182. Here we discern no prejudicial effect, given the overall strength of the government's case. *See id.*

Several defendants also maintain that the court did not give them sufficient time to confer with their

counsel regarding peremptory challenges. Trial courts have ample discretion to determine the procedures under which peremptory challenges are exercised, *see United States v. Thompson*, 76 F.3d 442, 451 (2d Cir. 1996), and the district court repeatedly warned defense counsel that they would have a brief period at the end of jury selection in which to consult regarding their strikes. While other procedures were available to the district judge, and the approach she took was, conservatively stated, aggressive, defendants have not demonstrated that the court abused its discretion.

Nuculovic argues that his trial counsel was constitutionally ineffective because his counsel allegedly fell asleep at various points during the trial and failed to consult with Nuculovic and call witnesses on his behalf. Nuculovic's claim is best addressed on habeas review under 28 U.S.C. § 2255, rather than on direct review, so "that the allegedly ineffective attorney . . . [is] given the opportunity to explain the conduct at issue." *United States v. Khedr*, 343 F.3d 96, 100 (2d Cir. 2003). Consequently, we decline to address this claim now. *See Massaro v. United States*, 538 U.S. 500, 504 (2003).

Finally, several of the defendants raise challenges to the sufficiency of the evidence adduced to support their convictions. "[A] defendant raising an appellate challenge to the sufficiency of the evidence supporting a conviction faces a heavy burden, because we must review the evidence in the light most favorable to the government, drawing all reasonable inferences in its favor." *United States v. Gaskin*, 364 F.3d 438, 459 (2d

Cir. 2004) (internal quotation marks omitted). We have repeatedly established that "[r]eversal is warranted only if no rational factfinder could have found the crimes charged proved beyond a reasonable doubt." *Id.* at 459-60. After reviewing the substantial evidence of guilt the government adduced at trial, we conclude that the defendants have not met this heavy burden.

We have considered the defendants' remaining contentions and find them to be without merit. Accordingly, we affirm the judgment of the district court.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES
OF AMERICA,

v. 04 CR 1110 (DLC)

ALEX RUDAJ, aka
"Sandro Rudovic," NARDINO
COLOTTI, aka "Lenny,"
NIKOLA DEDAJ, aka "Big
Nick," PRENKA IVEZAJ,
aka "Frankie," LJUSA
NUCULOVIC, aka "Louie,"
ANGELO DIPIETRO,
GJELOSH LELCAJ,

Defendants.

----------x

New York, N.Y.
October 11, 2005
9:00 a.m.

Before:

HON. DENISE COTE,

District Judge

APPEARANCES

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
JENNIFER RODGERS
TIMOTHY TREANOR

BENJAMIN GRUENSTEN
Assistant United States Attorneys

LAW OFFICE OF JAMES KOUSOUROS
Attorney for Defendant Alex Rudaj
BY: JAMES KOUSOUROS

JOSEPH TACOPINA, P.C.
Attorneys for Defendant Nardino Colotti
BY: JOSEPH TACOPINA
GEORGE VOMVOLAKIS

ROY KULCSAR ATTORNEY AT LAW
Attorney for Defendant Nikola Dedaj
BY: ROY RAYMOND KULCSAR

[997] Five of the defendants have moved to sever their trials from that of codefendant Nuculovic on the ground that the government's proffer of Nuculovic's statement to the FBI agents at their joint trial will infringe their rights under the sixth Amendment. They argue that the admission of the statement will violate their rights as articulated in Crawford vs. Washington, 541 U.S. 36, and that the government's proposed redaction of the Statement which accompanies its September 16 letter runs afoul of Bruton, 391 U.S. 123, and its progeny.

Since Nuculovic's statement is only offered against Nuculovic, Crawford does not apply to the analysis of this issue. United States vs. Chen, 393 F.3d at 150. So long as the concerns expressed in Bruton are adequately addressed, there is no separate Crawford issue. Id. As the Second Circuit as has

recently opined, there is no indication that Crawford expands the holding of Bruton. Id.

In Bruton the Court held that a limiting instruction will not always adequately protect one defendant from the prejudicial effects of the introduction at a joint trial of evidence intended for use only against a different defendant. Gray vs. Maryland, 523 U.S. at 190. In Richardson vs. Marsh, 481 U.S. 200, the Court approved the admission of a redacted confession at a joint trial accompanied by the appropriate limiting instructions, where the confession is not [998] incriminating on its face of the codefendant. Gray 523 U.S. at 191. Instead it required other evidence to link it to a codefendant. Id.

In Gray the Supreme Court returned again to the Bruton issue and held that a redaction that replaced a defendant's name with an obvious indication of deletion, such as a blank space, the word deleted or a similar symbol, fell within Bruton's protective rule. Id. At 192. It observed that an obvious deletion may well call the jurors' attention specially to the removed name. Id. At 193. The Gray Court approved the editing of a confession that would have answered the question, "Who was in the group that beat Stacey?" with the response, "Me and a few other guys," and rejected the response, "Me, deleted, deleted, and a few other guys," that was received at trial. Id. at 196.

As had Richardson, Gray acknowledged that prosecutors should not be forced to abandon the use

of a confession at a joint trial if they could be properly redacted. Id. at 196.

Applying the principles enunciated in Bruton, the Second Circuit has long held that confessions can be admitted at a joint trial by substituting a codefendant's name with a neutral pronoun, so long as the statement standing alone does not otherwise connect codefendants to the crimes. See, for example, United States vs. Williams, 936 F.2d at 700, United States vs. Tutino, 883 F.2d at 1135.

[999] In United States vs. Yousef, 327 F.3d 56, the redacted statements substituted the word neighbor for the codefendant's alias. Id. at 149. The redaction was approved with the observation that nothing in the redacted statement standing by itself implicated the codefendant or make the fact of the redaction obvious. Id. at 150. Any redaction should not indicate to the jury that the original statement contained actual names, Tutino 883 F.2d at 1135, and should not distort the statement's meaning, exclude substantially exculpatory information or change the tenor of the utterance as a whole. Yousef, 327 F.3d at 150.

In United States vs. Chen, 393 F.3d 139, the Second Circuit recently observed that the line between the testimony that falls within Bruton's scope and that which does not is often difficult to discern, but nonetheless concluded that statements in a confession that inculpated others, in that case other members of a board of directors, but that only did so

when placed in context with other testimony, were admissible at a joint trial. Id. at 149 and 50. It observed that because substantial evidence was necessary to link the codefendants to the confessional statements regarding the Board, the testimony fell outside Bruton's scope. Id.

The defendants argue that they are prejudiced by the redacted statement because it details the existence, scope and history of the RICO enterprise with which they are charged. [1000] They complain that the government has not used neutral pronouns in the redaction. They complain specifically about the use of the phrase "former Gambino associate" to refer to defendant Colotti; the phrase "six other people" to refer to those who went to Soccer Fever to close it down; and the phrase "the leaders of the criminal organization and others associated with them" to refer to those who Nuculovic believed were going to be arrested, arguing that these references are as blatantly incriminating as the use of the word "deleted." Finally, they assert that the Nuculovic statement even standing in isolation clearly connects them to the crimes with which they are charged.

As a general matter, the Nuculovic statement is admissible. Even as now redacted it does not implicate any codefendant. Only with the addition of other, substantial evidence could one of Nuculovic's codefendants be linked to the events he described in his statement to the FBI.

And then I start the detailed analysis of specific sections of the statement which I reviewed with counsel last week. Does anyone need me to review those again?

Thank you.

* * *

TRIAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES
OF AMERICA,

v. 04 CR 1110 (DLC)

ALEX RUDAJ, aka
"Sandro Rudovic," NARDINO
COLOTTI, aka "Lenny,"
NIKOLA DEDAJ, aka "Big
Nick," PRENKA IVEZAJ,
aka "Frankie," LJUSA
NUCULOVIC, aka "Louie,"
ANGELO DIPIETRO,

Defendants.

----------x

New York, N.Y.
December 8, 2005
9:00 a.m.

Before:

HON. DENISE COTE,

District Judge

APPEARANCES

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
JENNIFER RODGERS
TIMOTHY TREANOR

BENJAMIN GRUENSTEIN
Assistant United States Attorneys

LAW OFFICE OF JAMES KOUSOUROS

* * *

[8178] the jury later hears the statement "We all had guns," they are going to be drawn to this sole conclusion that he is talking about himself and the other defendants on trial. So I think, you know, going back to the Bruton analysis, I think that has to be changed, Your Honor, to reflect what I think was considered at least initially.

THE COURT: The redirect examination about the word "we" was targeted to cross-examination which could have been understood to suggest that when Mr. Nuculovic meant "we," he wasn't referring to himself as part of the group. So, therefore, it was appropriate redirect to clarify that Mr. Nuculovic wasn't cutting himself out of the word "we."

The issue under the confrontation clause, and, therefore, under Bruton, is not implicated here. This statement is coming in solely against Mr. Nuculovic. There has to be substantial independent evidence in order for the jury to have any understanding whatsoever as to what the content of the word "we" might mean, and, therefore, it does not implicate the concerns articulated by Bruton.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 31st day of August, two thousand and nine,

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United States of America, *Appellee*, v. Prenka Ivezaj, Nardino Colotti, Alex Rudaj, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic, *Defendants-Appellants*.	**ORDER** (Filed Aug. 31, 2009) Docket No: 06-3112-cr (L) 06-3275-cr (CON) 06-3296-cr (CON) 06-3339-cr (CON) 06-3372-cr (CON) 06-5908-cr (CON)

Appellant Nikola Dedaj having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Frank Perez
Frank Perez, Deputy Clerk